it would appear that in a solvent estate the undisposed of property should be applied for the payment of funeral, testamentary and administration expenses, debts and liabilities, subject to the retention of a fund sufficient to meet pecuniary legacies.

Order accordingly.

Solicitors: *Lim Cheng Ean & Co.; Donaldson & Burkinshaw.*

CHNG KOK TOW v. PUBLIC PROSECUTOR

[A.Cr.J. (Ali J.) July 27, 1967]

[Johore Bahru — Criminal Appeal No. 2 of 1966]

Road Traffic — Using a car for carrying goods without carrier's licence — Failure to prove goods carried for trade or business — Using vehicle without third party cover in respect of that user — Necessity for some prima facie evidence before onus under s. 106 Evidence Ordinance, 1950, can shift on accused — Road Traffic Ordinance, 1958, ss. 74(1) & 98(1).

The appellant while driving his motor car with luggage boot filled with vegetables and marine products was stopped by police constables and taken to the police station, where a report was made and a photograph of the car taken. He was charged with (a) using the motor contrary to section 98(1) of the Road Traffic Ordinance; (b) using the motor car without there being in force in relation to such user third party insurance contrary to section 74(1) of the same Ordinance. At the trial the photograph of the car taken at the police station was not produced. The learned magistrate called upon the appellant for his defence and convicted him on both charges.

Held: (1) there was no evidence to suggest that the goods were carried for purposes of trade or business. No *prima facie* case was made out against appellant and he should not have been called upon for his defence on this charge;

(2) on the 2nd charge, although the subject matter of this charge was something within the knowledge of the appellant, it was necessary for the prosecution to adduce *prima facie* evidence before the onus by virtue of section 106 Evidence Ordinance would shift to the appellant.

Cases referred to:—

(1) *Khoo Teck Yam* v. *Public Prosecutor* [1955] M.L.J. 112.

(2) *Re Tan Kheng Cheng* [1962] M.L.J. 310.

(3) *Darus* v. *Public Prosecutor* [1964] M.L.J. 146.

CRIMINAL APPEAL.

H. L. Tennakoon for the appellant.

Tunku Zaid (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Ali J.: This is an appeal from the decision of the learned magistrate, Johore Bahru, who convicted the appellant on two charges for offences under the Road Traffic Ordinance, 1958.

The first charge was in respect of an offence of using a motor car for the carriage of goods without a carrier's licence contrary to section 98(1) of the Ordinance, and the second charge was in respect of an offence of using the said motor car without there being in force in relation to such user a third party insurance contrary to section 74(1) of the same Ordinance.

The prosecution evidence established that on 26th June, 1965, at about 8.20 a.m. the appellant, while driving a motor car, was stopped by two police constables. In the luggage boot of the car was found a fairly large quantity of vegetables and some marine products. The appellant was brought to the police station where a report was made and a photograph of the car taken. For some reason or other, which is not clearly stated in the record, this photograph, which might lend some weight to the prosecution case, was not produced. Although the report made mention of the weight of the various items of vegetables and marine products found in the car, it did not appear that the constable, who made the report, had in fact properly weighed the articles. It is apparent from the grounds of decision of the trial magistrate that he regarded the quantity of goods to be large having regard to the evidence that the luggage boot was ajar and could not be closed. Quite apart from this, however, there was nothing in the evidence for the prosecution to suggest that the goods were for the purposes of trade or business. The word "goods" is defined in section 2 of the Ordinance to include "anything . . . . carried on or in a motor vehicle for the purposes of any trade or business . . . ." In terms of this definition it was incumbent on the prosecution in order to establish a charge under section 98(1) of the Ordinance to prove not only that the car was used for the carriage of goods but that the goods carried were for purposes of trade or business. Notwithstanding the lack of evidence that the goods were for purposes of trade or business the trial magistrate at the close of the prosecution case held that a *prima facie* case had been made out against the appellant not only on the 1st charge but also on the 2nd charge. The appellant gave evidence in his defence.

In a criminal prosecution, the burden of proving the guilt of an accused person lies with the prosecution and this burden never shifts. In terms of this principle it has time and again been stated in the courts of this country that an accused person is presumed innocent until he is proved guilty. In summary trials, therefore, before calling on an accused person for his defence it is necessary for the trial magistrate to be satisfied that the prosecution's evidence has disclosed a reasonable presumption of guilt against the accused. Having thus stated the principle I shall now proceed to deal with the case under review.

As has been stated earlier, there was no evidence adduced on behalf of the prosecution to suggest that the goods were for the purposes of trade or business. The only evidence that might possibly lead the trial magistrate to conclude that they were for purposes of trade or business was the evidence of the quantity. This is clear from the judgment of the magistrate who said:—

"Under the circumstances I found as a fact that the amount carried was large and that the articles were intended not for his father's birthday as he alleged but for his own eating-stall which was a place of business."

The fact that the appellant had an eating-stall was never disclosed in the prosecution's case and it is difficult to conceive how the trial magsitrate could have come to the conclusion at the close of the prosecution's case that the goods were intended for the appellant's eating-stall. There could be no doubt that the prosecution knew that the appellant had an eating-stall, but no attempt was made to prove this. Consequently, the only evidence that might have led to the conclusion that the goods were for the purposes of trade or business was the evidence of the quantity of the goods. With respect to the trial magistrate I am forced to say that such evidence could not be regarded as sufficient to justify the inference that the goods were for purposes of trade or business. It may well be that a person carries in his car a large quantity of goods for his own consumption or for the consumption of his guests. It may well be that these goods are intended for the purpose of trade or business. It is not open to the court to draw an adverse inference merely on the evidence of the quantity. Taking this view of the prosecution's evidence it must be held that it was wrong on the part of the trial magistrate to have called the appellant for his defence. The appeal against conviction on the first charge must, therefore, be allowed.

As regards the appeal on the second charge, it was submitted on behalf of the appellant that although the subject matter of the charge was something within the knowledge of the appellant so as to bring into operation the provision of section 106 of the Evidence Ordinance, 1950, it was necessary for the prosecution to adduce *prima facie* evidence before the onus of proof could shift to the appellant. In support of this contention reliance was placed on the decision of Buhagiar J. in *Khoo Teck Yam* v. *Public Prosecutor,*[1] and the judgment in *Re Tan Kheng Cheng.*[2] In the former case Buhagiar J. in his judgment said:—

"With regard to the second charge there is *prima facie* evidence adduced by the prosecution that the policy does not cover the carriage of goods for commercial purposes, although the burden of proving the existence of a policy to cover the use of the vehicle for the carriage of goods in connection with any trade or business was in my opinion on the appellant by virtue of section 106 of the Evidence Ordinance, 1950."

From the words in the judgment it would appear that the prosecution had obtained possession of the policy of insurance and had given evidence to the effect that the policy did not cover carriage of goods. In *Re Tan Kheng Cheng,* Adams J., taking the same view expressed in *Khoo Teck Yam* v. *Public Prosecutor,* said:—

"The police must adduce evidence to say that they asked the defendant for his certificate of insurance and that he was unable to produce it or that having asked him for it and inspected it, they found that it did not cover the use for which the vehicle was being put at the time that it was stopped. This, I may say, is most important. I strongly advise magistrates to ask to see both the certificate of insurance and the policy if they do call on the defence. They may very well find that the policy in fact covers the use of the vehicle."

A somewhat different view was expressed by Ong Hock Thye J. (as he then was) in *Darus* v. *Public Prosecutor* [3] in which the appellant was charged under section 92(1) of the Road Traffic Ordinance for using his motor car as a public service vehicle and under section 74(1) of the same Ordinance for using the said car without there being in force in respect of such user a policy of insurance in respect of 3rd party risks. Although the judgment in that case was largely concerned with the first charge, Ong Hock Thye J., having confirmed the conviction on that charge said, at page 148:—

"Conviction on the first charge, on the evidence produced in this case, makes conviction on the other two charges inevitable, and I accordingly dismiss this appeal, and confirm the judgment sentence and order of the magistrate."

If by the term "inevitable" the learned trial judge meant that there was no necessity on the part of the prosecution to adduce *prima facie* evidence with regard to the second charge, then that decision must be held to be in conflict with that arrived at in *Khoo Teck Yam's* case and in *Re Tan Kheng Cheng's* case, *supra.* On page 843 of *Sarkar* on Evidence, 10th Edition, *Phipson* 8th Ed., page 34 was quoted as having stated thus:—

"In the absence of statutory provision, the better opinion seems to be that, in general, some *prima facie* evidence must be given by the complainant in order to cast the burden on his adversary".

Commenting on this *Sarkar* said:—

"This is undoubtedly the most practical or reasonable way of applying the section and it has also been held here that before an accused person can be required to prove the matter within his especial knowledge, there must at least be some *prima facie* evidence against him."

On consideration I find myself in agreement with the views expressed in *Khoo Teck Yam's* case and in *Re Tan Kheng Cheng's* case, *supra.* The record discloses no *prima facie* evidence to show that any attempt had been made to examine the policy of insurance so as to satisfy the trial court that a case has been made out against the appellant on the second charge. Accordingly, the appeal against conviction on that charge

must also be allowed.

There will, therefore, be an order that the convictions on both charges be quashed, the sentences set aside and the fines, if paid, be refunded to the appellant. Any endorsement made on the licence should, therefore, be expunged.

Appeal allowed.

Solicitors: *Goh Bin Lay & Co.*

PUBLIC PROSECUTOR v. LEE AH KEH & ORS.

[A.Cr.J. (Ali J.) July 29, 1967]

[Johore Bahru — Criminal Revision No. 1 of 1967]

Contempt of Court — Subordinate court — Summary power to deal with — Identity of persons responsible — Procedure to be followed — Oaths and Affirmations Ordinance, 1949, s. 12(1) — Criminal Procedure Code (Cap. 6), s. 353 — Courts Ordinance, 1948, 3rd Schedule para. 24.

Criminal Law and Procedure — Contempt of court — Summary powers to punish — Right of accused to shew cause before sentence.

On July 16, 1967 in the magistrate's court at Pontian 57 persons represented by counsel were brought to the court jointly charged for being members of an unlicenced procession. Before going on the bench the magistrate heard singing and shouting in the court room.

While on the bench he appealed for calm through a Chinese interpreter addressed to all present in the court room. When the charge was being read out to the 57 persons noise was again heard. Again in the same manner the magistrate called for calm and ordered those who had been shouting to leave the court room. A missile was thrown at the bench by someone at the back of the court and persons stood on benches in the gallery and generally the noise continued. Failing to obtain calm the magistrate ordered the doors of the court to be closed and summarily ordered those found in the court, including the accused persons, to be committed to prison for contempt. On revision,

Held: (1) there was no doubt that the behaviour of the crowd in the court room constituted contempt of a criminal nature and any person guilty of it should be appropriately punished according to law;

(2) as the law in this country does not recognize group punishment, it is essential that their identities should be established to the satisfaction of the court, and before committing them for contempt each and every one of them should be given the opportunity to be heard.

Observations on the procedure which should be followed by a subordinate court when contempt is committed in its view or presence.

Per Curiam: Under section 353 of the Criminal Procedure Code (Cap. 6) and under paragraph 24 of the Third Schedule to the Courts Ordinance, 1948 the magistrate's court has power to take cognizance of any act which amounts to contempt and to exercise the summary power of punishment. To take cognizance of an offence is to deal with the matter as an offence without the formality of a charge or complaint. But this does not mean that the offender is not to be given the opportunity to be heard in his defence. To deny him this opportunity is to offend against the rule of natural justice.

Cases referred to:—

(1) *In re Pollard* (1868), 5 Moore N.S., 111.

(2) *Chang Hang Kiu & Ors.* v. *Sir Francis T. Piggott & Anor.* [1909] A.C. 312.

CRIMINAL REVISION.

T. T. Rajah for the applicants/accused.

Abdul Kadir bin Haji Kassim (Deputy Public Prosecutor) for the Public Prosecutor.

Cur. Adv. Vult.

Ali J.: This matter came by way of criminal revision under section 323 of the Criminal Procedure Code (Cap. 6) of an order made by the magistrate, Pontian, on 16th July, 1967, whereby 68 persons were committed to prison for one month without the option of a fine for contempt alleged to have been committed in the face of the court. My attention was drawn to the matter by a letter dated 16th July, 1967, from an advocate and solicitor, Mr. T. T. Rajah, who in invoking the revisionary power of the court stated, *inter alia,* that the order made was illegal. The record of the case was called for forthwith. It appears from this that at 10.10 a.m. on the 16th July, 1967, while the magistrate's court was in session in Pontian something had happened. The record states as follows:—

"Accused present.

Mr. T. T. Rajah for accused.

Chief Insp. Harbans Singh for prosecution.

Chaos in court.

Persons in the audience (behind the dock) convicted and sentenced to 1 month's imprisonment for contempt of court.

Court adjourned.

Sd. Hassan Ishak
16.7.67"

It would appear that on the day in question 57 persons had been brought to the court jointly charged with an offence under section 39(5)(a) of the Police Ordinance, 1952, for being members of an unlicensed procession and Mr. T. T. Rajah was acting as counsel for all the accused. At 11 a.m. on the same day when the court resumed its sitting Mr. Rajah applied for a stay of execution of the committal order for contempt. This was refused by the court. Although it is not clearly stated in the record it would seem to me that the order committing for contempt applied not only to "persons in the audience (behind the dock)" as recorded at 10.10 a.m. but also to the 57 accused persons who had been brought on the procession charge. That is to say, besides the 57 accused persons 11 others had been committed for contempt. Upon reading this record I decided to hear counsel on this matter and at the same time in the exercise of powers conferred by section 311 of the Criminal Procedure Code ordered that the committal order be stayed upon condition that each of the persons